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IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] 169

NATIONAL LABOR RELATIONS BOARD,
Petitioner-Respondent,

v.

COLUMBUS McKINNON CORPORATION,
Respondent-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent-Petitioner (hereafter called Respondent) prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, issued in the above-entitled case on March 18, 1966.

Citations to Opinions Below

The opinions herein of the United States Court of Appeals for the Second Circuit are unreported. The opinion granting the motion of Petitioner-Respondent (hereafter called Petitioner) to adjudge Respondent in civil contempt of a decree of said Court (R. 43) is printed as Appendix A hereto. The opinions denying Respondent's petition for rehearing, or in the alternative, for hearing *en banc* dated April 11, 1966 (R. 65, 69) are printed as Appendix B hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC § 1254 (1). The order of the Court of Appeals adjudging Respondent in civil contempt was issued March 18, 1966 (R. 45). Rehearing was denied on April 11, 1966 (R. 67, 71).

Question Presented

Should the Court have resolved, without hearing or trial, necessary issues of veracity and fact raised by conflicting affidavits constituting the only evidence as to the existence or non-existence of the sole fact upon which adjudication of alleged disobedience to the Court's decree could be based?

Statute Involved

The statutory provision involved herein is Title 18 § 401 (3), which reads as follows:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> • • •
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Statement

The National Labor Relations Board, Petitioner, moved the United States Court of Appeals for the Second Circuit for an order adjudging Respondent in civil contempt of a decree of said Court entered on May 4, 1965.

In its moving papers (R. 18, 19), Petitioner alleged that:

> "3. In fact, the Company has relied and does rely on the task rates in measuring the productivity of employees and in awarding or withholding merit wage in-

creases; and, in fact, the Company has in the past relied on the task rates in opposing grievances processed by the Union for the Company's refusal to grant particular merit increases."

This allegation of fact by the Petitioner is supported solely by an affidavit attached to the petition (R. 23, 23a). The Respondent's verified answer to the petition denies the only allegations of fact in the petition upon which contempt could be based and is supported by an affidavit of a representative of Respondent (R. 35-41).

The Court made a determination of this sole question of fact upon said conflicting affidavits, and resolved the issue of veracity raised thereby, without a trial or hearing, and adjudged Respondent in civil contempt of its order dated May 4, 1965.

Reasons for Granting the Writ

Respondent respectfully submits that this issue of fact should be determined from evidence and not from conflicting affidavits.

In *Hart Schaffner & Marx v. Alexander's Department Stores, Inc.* (2nd Cir. 1965), 341 F. 2d 101, the Court stated at page 102 that:

> "A civil contempt order will not issue unless there is 'clear and convincing' proof of violation of a court decree; a bare preponderance of the evidence will not suffice."

National Labor Relations Board v. Rath Packing Co. (8th Cir. 1941), 123 F. 2d 684 concerned an application by the NLRB to have an employer adjudged in contempt. The court held that testimony in regard to disputed facts should be taken before a special master. The opinion in pertinent part said that:

"It is our opinion that issues of fact affecting substantial rights should not be decided upon affidavits, if that can be avoided. Whether the respondent and its officers have disobeyed the decree of this Court; whether, if they have, their disobedience is technical and inadvertent or substantial and deliberate; and what action, remedial or disciplinary, is required to cure such disobedience, if any, are questions which we think should be determined from evidence. The weakness of accepting affidavits as evidence is well understood. It is often impossible to determine whether affiants are speaking from personal knowledge, from hearsay or from belief. The weight which should be accorded their statements cannot be estimated, since little knowledge of an affiant's character or of his prejudices can be gleaned from his affidavit. We think that the Board should be required to prove its charges by competent and material evidence, and that the respondent and its officers should be accorded the right to be confronted by the Board's witnesses and to cross examine them and to adduce evidence to disprove the charges made by the Board" (123 F. 2d p. 685).

In another civil contempt proceeding, *National Labor Relations Board v. Whittier Mills Co.* (5th Cir. 1941), 123 F. 2d 725, at page 727 the court stated:

"This is a proceeding in civil contempt to obtain the benefits of a decree and not one in criminal contempt to hold the respondents guilty of a crime, and the question for decision is not one of the intent with which, but simply whether, certain acts were done. But it goes without saying that in such a proceeding, the burden is on the petitioner to establish the facts necessary to support the order and that *since the matter is submitted on the petition and answer and not on evidence, the facts relied upon must be admitted in the answer and if any fact, material to the finding of contempt, stands unadmitted, the court may not find respondents in contempt*" (Emphasis added).

In *Cohn v. Kramer* (6th Cir. 1943), 136 F. 2d 293, at page 295 the Court stated that:

> "In a civil contempt proceeding for violation of a decree, the respondent is entitled to opportunity to controvert the charges against him; and, when he denies the charges, the burden rests upon the petitioner to prove by evidence that the decree has been violated. If the facts alleged as violation are neither admitted nor proven, the respondent may not be adjudged in contempt. This is elementary law."

Necessary issues of fact and veracity raised by conflicting affidavits in a civil contempt proceeding should, therefore, be resolved by taking proof at a trial or hearing.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. HITCHCOCK,
Counsel for Respondent-Petitioner.

Dated: May 16, 1966.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBUS McKINNON CORPORATION,
Respondent.

Before: Moore, Smith and Hays, U. S. C. JJ.

MOTION TO ADJUDGE RESPONDENT IN CIVIL CONTEMPT OF THIS COURT'S DECREE DATED MAY 4, 1965.

Motion granted.

J. J. S.,
P. R. H.,
U. S. C. JJ.

March 17, 1966.

Although I concur in the granting of Items 1(b) and (c) and 3, I would not grant the balance of the items requested in the prayer for relief.

L. P. M.,
U. S. C. J.

March 17, 1966.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBUS McKINNON CORPORATION,
Respondent.

PETITION FOR REHEARING.

Phillips, Lytle, Yorkey, Letchworth, Hitchcock & Blaine, Buffalo, New York, for respondent.

Petition denied.

J. J. S.,
P. R. H.,
U. S. C. JJ.

April 11, 1966.

Appendix B (Cont'd)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBUS McKINNON CORPORATION,
Respondent.

PETITION FOR REHEARING *IN BANC.*

Phillips, Lytle, Yorkey, Letchworth, Hitchcock & Blaine, Buffalo, New York, for respondent.

No active circuit judge having requested that the motion be reheard *in banc,* the petition is denied.

J. EDWARD LUMBARD,
Chief Judge.

11 April, 1966.